Routine Program Changes To Commonwealth of Virginia Coastal Management Program

Request for Concurrence January 9, 2006

Virginia Subaqueous Lands Management Code of Virginia Title 28.2, Chapter 12

Submitted by: The Commonwealth of Virginia

Department of Environmental Quality

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INTRODUCTION

The following constitutes a request by the Commonwealth of Virginia for the National Oceanic and Atmospheric Administration (NOAA) Office of Ocean and Coastal Resource Management (OCRM) to concur in a Routine Program Change to the Commonwealth of Virginia's Coastal Management Program (CMP).

The Commonwealth of Virginia has revised the Commonwealth's enforceable policies in Code of Virginia Title 28.2, Chapter 12, known as the Subaqueous Lands Management Program.

In accordance with requirements for Routine Program changes as set forth in Coastal Zone Management Act (CZMA) 306(e), 15 C.F.R. §923.84, and the guidelines for Routine Program Changes contained in OCRM's Program Change Guidance from July 1996, the Commonwealth of Virginia has prepared the following analysis of the changes. The analysis: (A) explains why the proffered changes to the State CMP are Routine Program Changes and not Amendments as described in 15 C.F.R. §923.80(d); and (B) identifies the enforceable policies to be added to the management program, describes the nature of each program change, and examines the impact the changes have on the existing management program.

ANALYSIS

The Commonwealth submits the changes to Code of Virginia Title 28.2, Chapter 12 as a Routine Program Change. The statutory sections governing the Subaqueous Lands Management Program were previously approved as part of the CMP in 1986. This submission updates these provisions to reflect amendments since that time.

(A) Routine Program Change

Pursuant to CZMA §306(e) and 15 C.F.R. §923.84, this analysis of the submitted change notifies OCRM of the Routine Program Change and explains why the program change will not result in an Amendment. Under 15 C.F.R. §923.80(d), amendments are defined as substantial changes in one or more of the five listed coastal management program areas:

- (1) uses subject to management;
- (2) special management areas;
- (3) boundaries;
- (4) authorities and organization;
- (5) coordination, public involvement and national interest.

OCRM's Program Change guidance states that a substantial change is a high threshold based on a case-by-case determination. Such determination is made by reviewing indicators of substantial change, such as whether new or revised enforceable policies

address coastal uses or resources not previously managed, or make major changes in the way a state CMP manages coastal uses or resources. OCRM's Program Change guidance also states that an explanation why a proposed change will not result in an Amendment should describe the elements of the State CMP that are affected.

The statutory provisions being submitted are primarily recodifications giving new section numbers to the statutory provisions already approved by NOAA as part of the original program in 1986. The statute, which was originally found at former Va. Code 62.1-1 et seq. included long sections without numbered subsections; in 1992, the Virginia General Assembly recodified the subaqueous lands statute at Va. Code 28.2-1200 et seq., subdividing the prior sections into individually numbered sections for easier use and greater clarity. The 1992 recodification also pulled in several sections of statutes that had not been referenced in the 1986 program appendix, but whose content was part of the CMP under the Virginia Marine Resources Commission's Subaqueous Guidelines, which were part of the approved program. In addition to the renumbering, there have been other minor updates to the program, including the renaming of the fee and royalty fund, further clarification of what small noncommercial piers can be constructed without Commission permits, inclusion of submerged aquatic vegetation among the factors considered in management of subaqueous lands, and provisions further supporting existing authority for removal of hazardous structures and sinking vessels.

A penalty provision added to the statute (§28.2-1213) was approved by Routine Program Change RPI 93-1 in 1993.

The changes do not substantially affect the uses subject to management under the CMP, special management areas, boundaries of the coastal zone, authorities and organization, or coordination, public involvement and national interest. Hence Virginia requests concurrence in this Routine Program Change.

(B) Effect of Changes on Program

The Subaqueous Lands Management Program statutes were, at the time of approval of Virginia's CMP in 1986 located in Va. Code §62.1-1 *et seq.*, but were recodified in 1992 to Va. Code §28.2-1200 *et seq.* The 1992 recodification subdivided some of the previous sections (particularly former Va. Code §62.1-3) into separate sections, but retained virtually all of the content of that section. New cross-references were supplied in the newly created sections, and minor changes were made to processes. Minor amendments in subsequent years dealt with individual sections.

Statutes affected by changes are identified in the attached table, which provides a description and analysis of each statutory change submitted. This Routine Program Change will be inserted in the CMP Document in Chapter III of Core Regulatory Program B (Subaqueous Land Management).

Statutory Change	Status of Law in 1986	Change to Law Since 1986	Significance of Change
28.2-1200. Ungranted peds of bays, rivers, creeks and shores of the sea to emain in common.	Part of original CMP approval [was §62.1-1]	 Added "hunting" to the list of activities enjoyed by the public in common on and over the subaqueous lands of the Commonwealth. (1995, Ch. 850 – Ungranted Shores of the Sea, Marshes, and Meadowlands – Management). Changed the term "State" Librarian to Librarian "of Virginia." (1998, Ch. 427 – Government – State Librarian – Designation as Librarian of Virginia). 	• Does not substantially change uses or authority subject to management under the CMP. Under the existing program the subaqueous lands "are the property of the Commonwealth and may be used as a common by all the people of the Commonwealth." The term "hunting" supplements and clarifies what was already authorized by the term "fowling" and other activities taking living creatures, and did
28.2-1201. Ungranted slands which rise from ands which are property of he Commonwealth.	Enacted in 1991, amended in 1992 and 1995.	• Declared that all ungranted islands which arise from "the lands of bays, rivers and creeks that are ungranted" under §28-1200 "shall remain the property of the Commonwealth and shall be managed by the Commission as provided in Article 2 (§28.2-1503 et seq.) of Chapter 15 of this title." And likewise, any unappropriated island or land, whether currently in existence or subsequently created, that abuts a barrier island of the Eastern Shore. Section does not apply to accretions to privately owned lands or islands; includes conflict of laws clause in favor of common law. (1991, Ch. 378; 1992, Ch. 836 - Marine Resources – Regulatory Bodies – Harvesting, Habitat; 1995, Ch. 850 - Ungranted Shores of the Sea, Marshes, and Meadowlands – Management).	not change the management regime. • Does not substantially change uses, special management areas, boundaries, authorities or coordination, public involvement, or national interest. Recognizes Commonwealth's interest in ungranted lands arising from subaqueous lands, and already recognized in Virginia's Constitution Art. XI, which was incorporated in CMP.

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28.2-1202. Rights of	Part of original CMP	 No change to this section, which defined the 	• Does not substantially change uses, special
owners to extend to mean	approval [was §62.1-2].	boundaries of, and the rights and limits of	management areas, boundaries, authorities
ow-water mark.		owners of, tracts of land lying on the bays,	or coordination, public involvement, or
		rivers, creeks and shores within the jurisdiction	national interest. These were always the
		of the Commonwealth, "subject to the provisions	boundaries used. The 1986 Final EIS for
		of §28.1-1200," except for the updated section	Virginia's CMP at II-4 stated that the mean
		number for the cross-reference (1992, Ch. 836 -	low water line marks the seaward limit of
		Marine Resources – Regulatory Bodies –	private property ownership. Although this
		Harvesting, Habitat).	provision was part of the subaqueous
			statute 62.1-1 – 62.1-4 submitted and
			approved in 1986, it was not expressly
			referenced by section number in the
			statutory appendix. It is submitted now,
			together with the updated reference.
28.2-1203. Unlawful use	Part of original CMP	• Section defined activities that are unlawful in the	• Technical, housekeeping amendment,
of subaqueous beds;	approval [was §62.1-3]	subaqueous beds without a permit, and	recognizing that pending activities
enalty.		exceptions to the permit requirement. The 1992	authorized under a pre-1972 permitting
		amendment removed outdated exceptions for	scheme had long since been completed; not
		some activities authorized prior to the 1972	a substantial change to uses or authorities
		enactment. (1992, Ch. 836 - Marine Resources –	under the CMP.
		Regulatory Bodies – Harvesting, Habitat)	
		 Defined further size limitations on riparian 	 Does not substantially change uses or
		owners' placement without a permit of small	authorities. Provided more details on the
		private noncommercial piers, allowing small	existing provision excusing some small
		attached boat lifts and open sided roof to shelter	private piers owners from permits (e.g. 6-ft.
		a single boat slip or lift, and subject to a permit	width, limited to within private pier lines
		requirement if the small pier affects oyster and	established by Virginia Marine Resources
		clam grounds as provided in §28.2-1205 (1998,	Commission or USACE). The existing

		Ch. 605 – Tidal Waters – Boat Shelters – Private Piers; 2000, Ch. 167 – Impacts on Oyster and Clam Grounds; 2001, Ch. 234 – Fisheries – Bottomland Permits – Exemptions; 2003, Ch. 973 – Fisheries – Private Piers – Regulation).	CMP allowed the setting of private pier limits not needing a permit by "proper authority" and specifically allowed the Commission to set such limits.
		• Added agricultural, horticultural or silvicultural irrigation on riparian lands or the watering of animals on riparian lands to those activities not requiring a permit, provided that no permanent structure is placed on or over the subaqueous bed, the person withdrawing water complies with Dept of Envtl. Quality requirements, and the activity is conducted without adverse impacts to instream beneficial uses (2001, Ch. 234 – Fisheries – Bottomland Permits – Exemptions).	• Does not substantially change uses or authorities subject to management under the CMP. These activities were not among those in the original list of CMP activities over which the Commission exercised authority, and the Commission retains authority where there is a permanent occupation of the subaqueous land.
\$28.2-1204. Authority of Commission over submerged lands.	Part of original CMP approval [was §62.1-3]	• Reorganized statement of existing authority of the Virginia Marine Resources Commission to issue permits for all reasonable uses, to establish bulkhead and lawful private pier lines, and to issue permits for recovery of underwater historic property, and cross references exceptions now contained in 28.2-1203.A. (1988, Ch. 868; 1992, c. 836- Marine Resources – Regulatory Bodies – Harvesting, Habitat).	• Does not substantially change uses or authorities subject to management under the CMP. Restated existing authority under approved CMP, former Va. Code 6.1-3, paragraphs 2, 4, 3. The exceptions were previously in former paragraph 1, now in 28.2-1203.A.
3 28.2-1204.1. Submerged equatic vegetation.	Enacted in 1999.	• Authorized the Commission, in consultation with the Virginia Institute of Marine Science, to develop guidelines for defining existing beds of submerged aquatic vegetation and delineating areas where there is potential for submerged	Does not substantially change uses or authorities, and does not confer new powers over submerged lands and activities on such lands. The section directs the conduct of research to improve

28.2-1204.2. Marine Habitat and Waterways mprovement Fund stablished.	Enacted in 2000.	aquatic vegetation restoration (1999, Ch. 547 – Fisheries, and Habitat of the Tidal Waters – Submerged Aquatic Vegetation – Guidelines). • Established in the state treasury a special nonreverting interest-bearing fund entitled the Marine Habitat and Waterways Improvement Fund. In addition to the receipt of moneys as provided by law, the Commissioner is authorized to accept gifts and grants for the Fund, as well as proceeds that may be received on the sale of state-owned marine lands. The Fund shall be used solely for the purposes of improving waters as authorized by law (2000, Ch. 1056 – Marine Habitat and Waterways Improvement Fund).	 understanding of the resource being managed under existing authority. Does not substantially change uses or authorities. Fund replaces more limited Special Public Oyster Rock Replenishment Fund in the approved CMP.
28.2-1205. Permits for he use of state-owned pottomlands.	Part of original CMP approval [was §62.1-3]	 Recodified this section, which established guidelines for determining whether to grant permit for the use of state-owned bottomlands, and provided for judicial review. (1992, c. 836 - Marine Resources – Regulatory Bodies – Harvesting, Habitat). Added "Submerged aquatic vegetation (SAV)" 	 Recodification did not change content of section Does not substantially change uses or
		to the list of factors the Commission must consider in weighing the public and private benefits of a proposed project and its effect (1996, Ch. 228 – Fisheries and Habitat of the Tidal Waters – Permits for Use of State-Owned Bottomlands – Factors).	authorities under the CMP, but provides further support to Commission's duty to consider effects on "marine and fisheries resources". Moreover, the original CMP's approved Subaqueous Guidelines already required special consideration for "beds of submerged aquatic vegetation" Par. B.7, Appendix III-3. In addition the Executive

	exercise its authority to grant or deny permits consistent with the public trust doctrine. Any decision made by the Commission that is consistent with the public trust doctrine shall not be deemed to have been made pursuant to the police power. Nothing in this subsection shall be construed to deprive a riparian land owner of rights he may have under common law (1999, Ch. 741 – State-Owned Bottomlands – Use	Order approved as part of the CMP already obliged the Commission and other agencies "14.to minimize damage to the productivity and diversity of the marine environment resulting from the alteration of subaqueous lands and <i>aquatic vegetation</i> ." • Does not substantially change uses or authorities under the CMP. Existing section 62.1-3 in original CMP required the Commission to be guided by Va. Const Art. XI declaring a public trust in the environment, and further provided that submerged lands are a "common" for all the people of the Commonwealth.
	 Permits – Public Trust Doctrine). Added a subsection requiring a permit for the placement of private piers measuring 100 or more feet from the mean low-water mark, which are used for noncommercial purposes by an owner of the riparian land in the waters opposite the land and that traverses commercially productive leased oyster or clam grounds, provided that the pier does not extend beyond the navigation line established by the Commission or the USACE (2000, Ch. 167 - Impacts on Oyster and Clam Grounds). Imposed requirement upon 	• Does not substantially change uses or authorities under the CMP. The existing section incorporated in the CMP authorized the Commission to issue permits for "the placement of private piers for noncommercial purposes by owners of the riparian lands in the waters opposite such riparian lands, provided such private piers shall not extend beyond the navigation line or lawful private pier lines established by proper authority."

		the Commission to act within 90 days of receipt of a complete joint permit application unless information or circumstances materially alter the conditions under which the permit would be issued. (2001, Ch. 72 – Tidal Waters – State-Owned Bottomlands – Use Permits). • Prohibited persons reapplying for the same or substantially similar use of the bottomlands within 12 months of the denial of a permit by the Commission (2004, Ch. 405 – Fisheries – Applications – State-Owned Bottomlands Permit).	• Does not substantially change uses or authorities under the CMP. Administrative change.
		,	Does not substantially change uses or authorities under the CMP. Under existing statute Commission had authority to charge royalties except where prohibited by law.
328.2-1206. Permit fees; exemptions.	Part of original CMP approval [was §62.1-3]	• /	• Fees and royalties from former Va. Code §62.1-3 unchanged from existing CMP.

		 Replaced "Public Oyster Rock Replenishment Fund with Marine Habitat and Waterways Improvement Fund as recipient of fees and royalties (2000, 1056 – Marine Habitat and Waterways Improvement Fund). 	Revised fund does not substantially change uses or authorities under the CMP.
		• Exempted from rents and royalties, but not from royalties for removal of bottom materials, riparian owners of commercial facilities engaged in ship construction or repair, providing services relating to the shipping of domestic or foreign cargo, and engaged in the business of selling or servicing watercraft. Added "directional drilling" to the existing exemptions from royalties for removal of bottom material. Added "rents" to the existing exemptions from fees and royalties applicable to the Virginia Department of Transportation, and counties, cities and towns. Added rents to funds that shall be paid into the Marine Habitat and Waterways Improvement Fund (2000, 1056 – Marine Habitat and Waterways Improvement Fund; 2004, Ch. 899 - Tidal Waters – State-Owned Bottomland – Royalties, Ch. 1018 – Tidal Waters – State-Owned Bottomland – Royalties).	• Does not substantially change uses or authorities under the CMP, but provides some exemptions from rents and royalties. These facilities still require permits and payment of permit fees as provided under the original CMP. The directional drilling provision does not substantially change uses or authorities under the CMP; directional drilling results in some incidental removal of material that was not historically subject to royalties. Addition of the term "rents" clarifies existing practice as former Va. Code 62.1-4 had used the collective term "rent royalties."
28.2-1207. Authority to	Content of section	• /	Does not substantially change uses or
ipprove permits for	approved as part of original	controversial permits authorized under 28.2-1205	authorities under the CMP. The procedure
encroachment on	CMP [VMRC Subaqueous	and 28.2-1206. Any application for a permit to	for issuance of uncontested permits for
ubaqueous beds; notice.	Guidelines]	trespass upon or over or encroach upon	lower cost projects by the Commissioner
		subaqueous beds which are the Commonwealth's	rather than the full Commission was

	The statutory sections were enacted in 1972 [was \$62.1-3.01] and 1973 [was \$62.1-3.02], amended in 1980, 1984, recodified in 1992, amended 1997	property may be approved by the Commissioner or his authorized representative if the application meets statutory requirements and the total value of the project does not exceed \$50,000.00, the application is not protested by any citizen or objected to by any state agency and the project will not require any other permit from the Commission. Shore erosion control projects meeting these criteria and recommended by the soil and water conservation district may be approved by the Commission, after notice to the Virginia Institute of Marine Science, without notice to or approval of any other state agency (1992, Ch. 836 - Marine Resources – Regulatory Bodies – Harvesting, Habitat).	approved as part of the original CMP's Subaqueous Guidelines, paragraph A.3.C, found in Appendix III-3 to the original submittal and FEIS. The referenced statutory provision was part of the subaqueous lands statute Va. Code 62.1-1 – 62.1-4 submitted and approved in 1986, but the statute sections were not expressly referenced in the statutory appendix. It is submitted now for approval as recodified.
		• Commission authorized, in conjunction with affected state and federal agencies, to develop an expedited process for issuing general permits for activities to improve water quality and for activities required during emergencies in which a determination has been made that there is a threat to health and safety or public or private property (1997, Ch. 845 – Licenses and Permits – State Water Control Board and Virginia Marine Resources Commission – General Permits).	 Amendment does not substantially change uses or authorities for management under CMP, but provides simplified permit procedures to meet uses that are already part of the CMP.
28.2-1208. Granting assements in or leasing the beds of certain waters.	Part of original CMP approval [was §62.1-4]	• Recodified existing provision, former Va. Code 62.1-4, for the grant of easements for mineral activities. (1992, Ch. 836 - Marine Resources –	 Does not change uses or authorities under the CMP.

- Provided that the Commission shall, in conjunction with the Division of Mineral Resources of the Department of Mines, Minerals and Energy and with the assistance of affected state agencies, departments and institutions, maintain a State Subaqueous Minerals Management Plan providing for public hearings and competitive bids (1992, Ch. 836 - Marine Resources – Regulatory Bodies – Harvesting, Habitat). Appended to the list of provisions in the Plan the "(iii) preparation of environmental impact reports to be reviewed by the appropriate agency of the Commonwealth, and (iv) review and approval of leases by the Attorney General and the Governor" already required by the statute [former 62.1-4, as recodified]. Added a list of items that the environmental impact reports must address (1993, Ch. 644 – Subaqueous Mineral Management Plan – Easements, Leasing – Environmental Impact Reports).
- Does not substantially change uses or authorities under the CMP. Jurisdiction over the development of minerals was provided for under 62.1-4, including approval by the Governor and Attorney General. Environmental impact reports were also part of the approved CMP. Federal and State environmental impact review was described in the CMP FEIS at VII-9 to −13, and Virginia's Environmental Quality Act, Va. Code 10-177 et seq., was submitted and approved as part of the original CMP, Appendix II-2.

- Directed all rents or royalties collected from easements or leases described in this section to the Marine Habitat and Waterways Improvement Fund, replacing the Public Oyster Rocks Replenishment Fund (2000, Ch. 1056 - Marine Habitat and Waterways Improvement Fund).
 Added a proviso requiring a royalty on any
- As noted above, redesignation of the Fund does not substantially change uses or authorities under the CMP. Addition of sources for royalty payments are subject to same regulation as under previously approved CMP.

		easement or lease granting the right to prospect	
		for oil, gas, and other minerals. Added a	
		provision for the purchase payment for	
		easements granted to a public service	
		corporation, certificated telephone company,	
		interstate natural gas company or provider of	
		cable television or other multichannel video	
		programming service (2004 Amendments – Ch. 899 - Tidal Waters – State-Owned Bottomland	
		Royalties, Ch. 1018 – Tidal Waters – State-	
		Owned Bottomland – Royalties).	
28.2-1209. Maintenance or removal of structures crected upon or over state-owned subaqueous	Content of section approved as part of original CMP [VMRC Subaqueous Guidelines] The statutory	 Declared that any person constructing or erecting any structure upon or over state-owned subaqueous bottoms will be responsible for the maintenance or removal of the structure upon its 	Does not substantially changes uses or authorities managed under the CMP. The VMRC Subaqueous Guidelines, subsection A.3.n, approved as part of the original
ottoms.	section was enacted in	abandonment or its falling into a state of	CMP, provided that "Any person, firm or
/ottoms.	1974 [was §62.1-3.03] and	disrepair. An exemption is made for public	corporation constructing or erecting any
	recodified in 1992.	service corporations with regard to cables,	structure upon or over state-owned bottoms
		conduit and pipes upon prior approval of the	shall be responsible for the maintenance or
		Commission (1992, Ch. 836 - Marine Resources	removal of such structure upon its
		– Regulatory Bodies – Harvesting, Habitat).	abandonment or its falling into a state of
			disrepair." Appendix III-3. Although this
			statutory version of the obligation was part of the subaqueous statute 62.1-1 – 62.1-4
			submitted and approved in 1986, it was not
			expressly referenced in the statutory
			appendix. It is submitted now for approval.

\$28.2-1210. Removal of obstructions or hazardous property from state waters; penalty.	Content of section approved <i>in part</i> as part of original CMP [VMRC Subaqueous Guidelines] The statutory section was enacted in 1974 [was §62.1-194.1:1] recodified in 1992, and amended in 1997 and 1999	of a structure or vessel found in or upon the state waters that has been abandoned or fallen into a state of disrepair so as to constitute a hazard or obstruction to the use of the waterway to repair or remove the property. In the instance where the owner is unascertainable, the Commission may have the property removed after giving notice by publication in the area where the property is located (1992, Ch. 836 - Marine Resources – Regulatory Bodies – Harvesting, Habitat; (1997, Ch. 258 – State Waters – Removal of Obstructions – Vessels in Danger of Sinking). Required action by owner upon receipt of notice from the Commission or a lawenforcement official, to continue in a state of abandonment and in danger of sinking, but upon an act of God, the Commission or lawenforcement official shall not issue a notification until 60 days following the occurrence. Persons violating this subsection are guilty of a Class 3	• Does not substantially change uses or authorities managed under the CMP. The VMRC Subaqueous Guidelines, subsection A.3.n, approved as part of the original CMP, provided that "Any person, firm or corporation constructing or erecting any structure upon or over state-owned bottoms shall be responsible for the maintenance or removal of such structure upon its abandonment or its falling into a state of disrepair." Appendix III-3. And former Va. Code 62.1-3 made unpermitted encroachments unlawful. The statutory provision was not expressly referenced in the statutory appendix. It is submitted now for approval.
28.2-1211. Injunction	Part of original CMP	Recodified with updated cross-reference to	Does not substantially change uses or
gainst violation of §28.2-	approval [was §62.1-3.1]	§28.2-1203 (1992, Ch. 836 - Marine Resources –	authorities under the CMP.
.203.		Regulatory Bodies – Harvesting, Habitat).	
28.2-1212. Monitoring,	Enacted in 1992	Authorized the Commissioner to require	 Does not substantially change uses or
nspections, compliance		permittees to implement monitoring and	authorities under the CMP as the VMRC
ind restoration.		reporting procedures, and to conduct on-site	already possesses the power to compel

		inspections reasonably necessary to safeguard the property and interests of the Commonwealth and determine compliance. Authorized the Commissioner, upon receipt of a sworn complaint of a substantial statutory violation from the designated enforcement officer, to issue an order requiring all or part of the activities on the site to be stopped until the specified corrective measures have been taken. The Commission may also order that the affected site be restored to its previous condition if the Commission finds that restoration is necessary to recover lost resources or to prevent further damage to resources. (1992, Ch. 836 - Marine Resources – Regulatory Bodies – Harvesting, Habitat).	corrective action under the approved CMP. Enforcement authorities are supplemental to the 28.2-1211 injunction authority already incorporated in the CMP, and to the restoration enforcement provisions approved as part of the CMP in 1993 as RPI 93-1. These requirements are enforceable by injunction.
328.2-1213. Penalties.	Approved as part of CMP in 1993 by RPI 93-1.	 Amendment directs that penalties and civil charges shall be paid into the Marine Habitat and Waterways Improvement Fund. (2000, Ch. 1056 Marine Habitat and Waterways Improvement Fund). 	Does not substantially change uses or authorities under the CMP.